

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S OBJECTION TO MAGISTRATE JUDGE
JOYNER'S AUGUST 8, 2008 OPINION AND ORDER [DKT #1756]**

Expedited Consideration Requested

Plaintiff, the State of Oklahoma ("the State"), pursuant to Fed. R. Civ. P. 72(a), respectfully objects to Magistrate Judge Joyner's August 8, 2008 Opinion and Order ("August 8, 2008 Order") [DKT #1756] which granted Defendants' request for extensions of the expert disclosure deadlines. The August 8, 2008 Order is clearly erroneous and contrary to law because (1) the findings made by Magistrate Judge Joyner to support his grant of extensions to Defendants do not rise to the level of "good cause," (2) it is inconsistent with Magistrate Judge Joyner's order on an earlier request by the State for an extension, and (3) it unfairly prejudices the State.

I. Legal Standard

Federal Rule of Civil Procedure 72(a), which governs nondispositive orders by Federal Magistrate Judges, states that "[a] party may serve and file objections to the order within 10 days after being served with a copy." Rule 72(a) also states that, "the district judge to whom the case is assigned shall consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." An order is clearly erroneous or contrary to law if the

district court, "on the entire evidence[,] is left with the definite and firm conviction that a mistake has been committed." *Mitchell v. KDJM-FM*, 2007 WL 2572330, *2 (D. Colo. Sept. 6, 2007); *Galaxy Ventures, LLC v. Allen*, 2005 WL 5988656, *3 (D.N.M. Oct. 6, 2005) (same).

This objection involves Magistrate Judge Joyner's modification of the scheduling order in this case. Fed. R. Civ. P. 16(b) states that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." *See also* DKT #1706 (May 15, 2008 Order) ("the court has admonished all parties that extensions of the scheduling order would be *rarely granted*, and only upon *unforeseeable good cause*") (emphasis added).

"The 'good cause' standard primarily considers the diligence of the party seeking the amendment. The party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines." *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1221 (D. Kan. 1995) (citations and quotations omitted); *see also Colorado Visionary Academy v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2000). As Defendants have pointed out in one of their own briefs, "scheduling orders must mean something if the parties and the court are ever to achieve some sort of finality." *See* DKT #1652 (quoting *ADC Telecommunications, Inc. v. Thomas & Betts Corp.*, 2001 WL 1381098, *4 (D. Minn. Oct. 18, 2001)). Accordingly, the State agrees with Defendants' observation: the good cause standard "is a demanding one." *See id.*

II. Background

Defendants have long been well-aware of the substance of the State's claims in this lawsuit, and thus have long been in a position to prepare the expert portion of their case. For example, many years before the State filed this lawsuit, State officials, experts, litigants in other

lawsuits, and the public at-large had concerns about pollution resulting from poultry waste. *See, e.g.*, DKT #1736 (Exs. 1, 2 and 3 to "State of Oklahoma's Response in Opposition to 'Defendants' Joint Motion for Additional Time to Produce Expert Reports' [DKT #1722]"); DKT #978 (Exs. 7-13 to "State of Oklahoma's Response in Opposition to 'Defendants' Motion for Entry of a Case Management Order"). Further, the State's Complaint contained an extensive explanation of the basis and scope of the State's claims, as have the State's two amended complaints. *See* DKT #2, #18 & #1215. Yet further, to date, the State has made a Rule 26(a) disclosure, responded to some 208 interrogatories, 460 requests for production and 286 requests for admission, produced more than a million pages of documents, and, not including its retained expert witnesses, tendered more than 25 witnesses for deposition. And since February 1, 2007, the State has disclosed to Defendants on a continuing basis sampling and analysis data (with supporting materials) totaling over 50,000 pages.

On March 9, 2007, this Court entered its Scheduling Order. *See* DKT #1075. That Scheduling Order provided for a two-month spacing between State's non-damages experts and Defendants' non-damages experts. Defendants did not move for reconsideration of or file objections to that Scheduling Order, including its structure of a two-month spacing between the disclosure of the State's non-damages experts and Defendants' non-damages experts.

Nevertheless, on September 26, 2007, the Cargill Defendants moved to modify the Scheduling Order, seeking, among other things, a *one-year* spacing between the sides' respective non-damages expert disclosure deadlines. *See* DKT #1297.¹ The State, in contrast, argued to maintain the two-month spacing between the disclosure deadlines. *See* DKT #1322. On

¹ This motion was subsequently joined by the Tyson Defendants, *see* DKT #1299, Defendant Peterson Farms, Inc., *see* DKT #1328, Defendant Simmons Foods, Inc., *see* DKT #1348, and the Cal-Maine Defendants, *see* DKT #1349.

November 15, 2007, "having considered the remaining discovery issues and the arguments and authority presented by the parties," this Court entered its Amended Scheduling Order. *See* DKT #1376. The Amended Scheduling Order provided for a three-month spacing between State's non-damages experts and Defendants' non-damages experts. Simply put, Defendants presented their case for a far lengthier spacing between the respective disclosures, and the Court largely rejected it. Defendants did not move for reconsideration of or file objections to the Amended Scheduling Order.

On November 14, 2007, in connection with its Motion for Preliminary Injunction, the State provided affidavits from a number of its experts. *See* DKT #1373. While the focus of the Motion for Preliminary Injunction was bacterial pollution, many of the topics covered by the State's experts addressed issues pertinent to the case as a whole.² These experts produced considered materials, and were subjected to cross-examination by Defendants in depositions and in the preliminary injunction proceedings.

Subsequently, on March 7, 2008, the State, careful not to upset the basic expert disclosure structure adopted by the Court in the Amended Scheduling Order, moved for *mutual* four-month extensions of the deadlines for disclosure of the two sides' respective non-damages experts. *See* DKT #1618. Despite the fact that under the State's proposal the two sides would enjoy *equivalent* extensions to their respective non-damages expert disclosure deadlines, Defendants strenuously opposed the State's motion. *See* DKT #1652. On March 27, 2008, the Court granted a *mutual* 45-day extension. *See* DKT #1658.

² For example, aspects of the State's fate and transport case and aspects of the State's phosphorus case were previewed for Defendants at the preliminary injunction hearing.

By agreement of the parties, on April 1, 2008, the State disclosed its list of experts, and set forth their areas of expertise and a general description of the areas of their anticipated testimony, thereby giving Defendants further information for their expert preparations.

On May 13, 2008, the State, again careful not to upset the basic expert disclosure structure of the Amended Scheduling Order, moved for *mutual*, very brief (*i.e.*, one to two week) extensions of the deadlines for disclosure of certain of the two sides' respective non-damages experts. *See* DKT #1702. Defendants again strenuously opposed this motion, arguing that "[t]his Court has indicated on several occasions . . . that the deadlines in its Scheduling Order for expert reports are firm." *See* DKT #1704 ("Defendants' Joint Response in Opposition to Plaintiff's Motion for Extension of Expert Witness Report Disclosure Deadline"). Defendants went on to argue:

The Court should remain firm with the deadlines in the case at this stage, or else other deadlines will have to be moved and the domino effect will render the Scheduling Order meaningless, and the course of the case will lack the necessary predictability for proper preparation and fairness for both sides.

See id.

In its May 15, 2008 Order the Court stated: "Defendants object to the extensions sought and correctly recite multiple prior occasions on which the court has admonished all parties that extensions of the scheduling order would be *rarely granted*, and only upon *unforeseeable good cause*." *See* DKT #1706 (emphasis added). The Court found good cause for the State's request and granted a very brief mutual extension to the two sides. *See id.*

The State made disclosure of its 16 retained non-damages experts pursuant to the deadlines set forth in the Court's orders.³ It has also produced these experts' respective considered materials. A number of these experts have now been deposed by Defendants.

Under the schedule that existed prior to entry of the August 8, 2008 Order, Defendants were required to disclose all of their non-damages experts on August 14, 2008, with the following exceptions: (a) Defendants' expert reports relating to watershed modeling, production of poultry waste and the management thereof, and river and stream ecological / biological injuries were due on August 21, 2008; and (b) Defendants' expert reports relating to lake modeling, and lake injuries or limnology were due on August 28, 2008. Due to glitches in the disclosure of the modeling experts' considered materials by the State, the State agreed to an extension until October 24, 2008, for Defendants to disclose their expert reports addressing modeling. *See* July 17, 2008 Hearing Transcript, p. 77.

Notably, at no time in responding to the State's requests for *mutual* extensions of the deadlines for disclosure of the two sides' respective non-damages experts did Defendants indicate that they intended to seek an additional *unilateral* extension of time to disclose their non-damages experts. Rather, Defendants waited until *after* the State's requests for the mutual extensions, *after* the Court ruled on those requests, and *after* the State's disclosure deadline had already passed to disclose their purported need for an extension.

In their Motion, Defendants sought an across-the-board general two-month extension, as well as additional extensions ranging from four to 9½ months for certain specified experts. With

³ For several reports the State has subsequently turned errata sheets over to Defendants. These errata sheets address, among other things, calculation, typographical and citation corrections or omissions -- corrections and omissions that were at least in part precipitated by the time constraints the State's experts were under when the State's request for a mutual four-month extension was denied. The errata sheets have not materially changed any expert's conclusion. These errata sheets were provided pursuant to Fed. R. Civ. P. 26(e).

respect to the across-the-board general two-month extension, Defendants did not identify the experts purportedly needing the extension, the subject matter(s) on which they would be offering opinions, or the reasons why -- despite having more than three years to prepare their expert case -- their respective disclosures could not be completed within the timeframe established by the existing scheduling order.

Magistrate Judge Joyner held a hearing on Defendants' requests for extension on July 17, 2008, and on August 8, 2008, entered an Order granting, with one minor exception, *the entirety of the relief being sought by Defendants*. Specifically, he granted a general two-month extension for Defendants to disclose their non-damages experts and extraordinary extensions -- ranging from four to 9½ months -- for Defendants to disclose certain named non-damages experts (and in the case of the Cargill Defendants, certain potential categories of non-damages experts).

III. Argument

A. **The August 8, 2008 Order is clearly erroneous and contrary to law because the findings made by Magistrate Judge Joyner to support his grant of extensions to Defendants do not rise to the level of "good cause"**

The August 8, 2008 Order sets forth the following grounds as the basis for granting Defendants' requested extensions to the deadline to disclose their non-damages experts:

- (1) That the State disclosed 18 expert reports, and that the reports were voluminous;
- (2) That Defendants have at least 18 expert depositions to take;
- (3) That Defendants must prepare rebuttal expert reports;
- (4) That the parties are continuing to take 30(b)(6) depositions;
- (5) That the State disclosed 33 non-retained experts; and
- (6) That there have been "numerous instances of delayed and / or ongoing production of necessary data needed by Defendants to properly prepare their defense" and that "[s]ome delays are attributable to actions and / or inactions by Plaintiff."

See August 8, 2008 Order. Even a very basic examination of these grounds found by Magistrate Judge Joyner makes abundantly clear, however, that they do not rise to the level of "good cause" needed to justify the requested extensions. Moreover, aside from Dr. Connolly, Magistrate Judge Joyner made *no* specific findings of good cause supporting the extraordinary extensions of Drs. Bierman, McGuire, Sullivan, Horne and Chadwick.

With regard to the first ground found by Magistrate Judge Joyner, the fact of the matter is that the State disclosed 15 expert reports,⁴ not 18. This error aside, *the number* of retained experts disclosed by the State in a case of this nature was by no means unforeseeable or surprising to Defendants. In fact, in September 2007 Defendants had previously unsuccessfully argued that the anticipated volume and variety of the State's experts warranted a one-year spacing between the disclosure of the State's and Defendants' respective non-damages retained experts. *See* DKT #1297 at pp. 19-20. Further, it should not be overlooked that nine of the State's retained experts authoring reports were previously disclosed in connection with the State's November 2007 Motion for Preliminary Injunction. Additionally, it should be noted that the identity of the State's experts, their general areas of expertise and a general description of the areas of their anticipated testimony were disclosed to Defendants on April 1, 2008.

Neither is the fact that the State's experts' reports would be, and in fact are, voluminous a surprise to Defendants. Indeed, as noted above, Defendants fully expected receiving voluminous reports. *See* DKT #1297 at pp. 19-20. Furthermore, the 1993 amendments to Fed. R. Civ. P. 26(b)(4) contemplate a comprehensive disclosure of information by retained experts -- so much information, in fact, that the advisory committee noted that "in many cases the report may eliminate the need for a deposition." *See* Advisory Committee Notes to 1993 Amendments to

⁴ One report was jointly authored by two experts.

Fed. R. Civ. P. 26. Simply put, this first ground cited by Magistrate Judge Joyner does not, as a matter of law or fact, constitute good cause for an extension.

With regard to the second ground, Magistrate Judge Joyner's finding ignores the fact that there is no right to a deposition of each of the State's retained experts *before* Defendants disclose their own retained experts. As just noted, the expanded disclosure requirements for retained expert witnesses enacted in the 1993 Amendments to Fed. R. Civ. P. led the advisory committee suggest that in many cases the report may even eliminate the need for a deposition. Thus, this ground does not, as a matter of law or fact, constitute good cause for an extension.

With regard to the third ground found by Magistrate Judge Joyner, that Defendants have to prepare disclosures for their own retained expert witnesses prior to the disclosure deadline is itself hardly a remarkable proposition and hardly constitutes good cause for an extension. Rather, it merely states a truism. Indeed, Defendants had known since November 15, 2007, that they would have three months in which to prepare any disclosures they wished to make. *See* DKT #1376.

With regard to the fourth ground found by Magistrate Judge Joyner, that the parties are continuing to take 30(b)(6) depositions, this does not constitute good cause for an extension. Discovery has been open for two years (and will be open until April 16, 2009); that Defendants had not completed whatever 30(b)(6) depositions they deemed necessary for their expert reports in a timely manner is no fault of the State. *See, e.g., Deghand*, 904 F. Supp. at 1221 ("Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief"). It certainly does not rise to the level of good cause.

With regard to the fifth ground found by Magistrate Judge Joyner, it should be noted that the State disclosed the non-retained expert witnesses whom it may call on April 1, 2008 -- *in full*

compliance with the Amended Scheduling Order entered on November 15, 2007. Under that Scheduling Order, Defendants would have had three months within which to disclose the non-retained expert witnesses whom they may call. Significantly, however, the March 27, 2008 45-day extension of the State's expert disclosure deadline resulted in Defendants in fact already having *an additional* 45-days to address the State's non-retained expert witnesses. For Magistrate Judge Joyner then to found an extension upon the fact that Defendants might wish to depose these non-retained expert witnesses before making their expert disclosures when Defendants already had an additional 45-days to address these witnesses is simply clearly erroneous and contrary to law.

With regard to the sixth and final ground found by Magistrate Judge Joyner, closer examination reveals that this does not constitute "good cause" either. First, that there is ongoing production of data from the State's sampling program is simply reflective of the fact that the State's sampling and analysis program is still ongoing. Defendants are receiving production of this data in a timely manner. Second, while it is true that production to Defendants of a very small percentage of data from State's sampling and analysis program was delayed, such problems were cleared up by the end of June. *See* DKT #1732. Third, Defendants' assertions that they have been prejudiced in their expert preparation by delays in the production of certain DEQ databases rings hollow in light of the fact that Defendants in fact have had the information in these databases in hard-copy form since November 2006 (which was supplemented in January 2008) and that Defendants have taken two days of depositions of State witnesses on the information contained in and relating to these databases.⁵ *See* DKT #1736 at p. 10 fn 7. Fourth,

⁵ An additional four-hour deposition on the topics of biosolids and nutrient loading will take place on September 11, 2008.

Defendants' assertions that they have been prejudiced in their expert preparation by delays in the production of certain privileged documents rings hollow in light of the fact that Defendant Peterson agreed to a stay of production of these documents while this Court rules on the State's objections to Magistrate Judge Joyner's order erroneously compelling their production. *See* DKT #1736 at p. 10 fn 7. Fifth and finally, with respect to delays in the State's production of its experts' modeling data, the State has agreed to an extension in time for the disclosure of Defendants' modeling experts comparable in length to the length of time the production of the modeling data was delayed. However, this extension in no way constitutes good cause for the across-the-board extension or other extraordinary extensions the August 8, 2008 Order provides.

In sum, none of the findings made by Magistrate Judge Joyner, either individually or collectively, rise to the level of good cause necessary to justify the modification to the scheduling order reflected in the August 8, 2008 Order.

B. The August 8, 2008 Order is clearly erroneous and contrary to law because it is inconsistent with Magistrate Judge Joyner's order on an earlier request by the State for an extension

Magistrate Judge Joyner's August 8, 2008 Order on Defendants' request for unilateral lengthy extensions of their non-damages expert disclosure deadlines was markedly inconsistent with his order on an earlier request by the State for an extension of the non-damages expert disclosure deadline, and therefore the August 8, 2008 Order is clearly erroneous and contrary to law.

Specifically, in response to an earlier request by the State for a mutual four-month extension of the non-damages expert disclosure deadline, and despite a finding of good cause -- namely the time required in preparation for and presentation of the hearing on the motion for preliminary injunction and the fact that Defendants had withheld for more than a year and a half

disclosure of the number of their birds in the watershed -- the relief afforded to the State was *far less* time than requested. Indeed, Magistrate Judge Joyner granted a mere 45-day extension. *See* DKT #1685 (March 27, 2008 Order). Subsequently, "the court . . . admonished all parties that extensions of the scheduling order would be rarely granted, and only upon unforeseeable good cause." *See* DKT #1706 (May 15, 2008 Order).

In contrast to the severely pared-back 45-day extension that was granted in response to the State's request, Magistrate Judge Joyner, with a single exception, granted *in full* each of the lengthy unilateral extensions requested by Defendants⁶:

- Defendants requested a general extension until October 14, 2008. Magistrate Judge Joyner's August 8, 2008 Order granted Defendants a general extension until October 14, 2008.
- Defendants requested an extension until December 15, 2008 for the disclosure of Dr. McGuire. Magistrate Judge Joyner's August 8, 2008 Order granted Defendants an extension until December 15, 2008 for the disclosure of Dr. McGuire.
- Defendants requested an extension until December 12, 2008 for the disclosure of Dr. Bierman. Magistrate Judge Joyner's August 8, 2008 Order granted Defendants an extension until December 12, 2008 for the disclosure of Dr. Bierman.
- Defendants requested an extension until December 19, 2008 for the disclosure of Drs. Sullivan and Horne. Magistrate Judge Joyner's August 8, 2008 Order granted Defendants an extension until December 19, 2008 for the disclosure of Drs. Sullivan and Horne.
- Defendants requested an extension until December 19, 2008 for the disclosure of Dr. Chadwick's initial report and until May 30, 2009 for the disclosure of his final report. Magistrate Judge Joyner's August 8, 2008 Order granted Defendants an extension until December 19, 2008 for the disclosure of Dr. Chadwick's initial report and until May 30, 2009 for the disclosure of his final report.

⁶ Apparently recognizing the utter unreasonableness of the length of some of the extensions requested in their Motion, at the July 17, 2008, hearing Defendants shortened the length of some of the requested extensions. *See, e.g.*, July 17, 2008 Transcript, pp. 58-59 & 83. The single exception noted above involved Dr. Connolly. Defendants requested an extension until February 5, 2009, for the disclosure of Dr. Connolly's report. The Court granted Defendants until December 19, 2008, for the disclosure.

See DKT #1722, July 17, 2008 Hearing Transcript & August 8, 2008 Order. Thus, in addition to the mutual 45-day extension granted the parties on March 27, 2008, *see* DKT #1685, under the August 8, 2008 Order Defendants now enjoy the benefits of further unilateral two- to 9½-month extensions in which to make their non-damages expert witness disclosures.

Simply put, requests for relief from the scheduling order should be analyzed and resolved consistently. The lengthy unilateral extensions granted Defendants are entirely inconsistent with Magistrate Judge Joyner's earlier pronouncements that extensions would be rarely granted and only upon unforeseeable good cause. This inconsistency warrants sustaining the State's objection and vacating the August 8, 2008 Order.

C. The August 8, 2008 Order is clearly erroneous and contrary to law because it unfairly prejudices the State

There is nothing in the August 8, 2008 Order reflecting that Magistrate Judge Joyner weighed the prejudice that granting Defendants' requests for extension would cause the State. Had such an analysis properly occurred, it would have been abundantly clear that the extensions unfairly prejudice the State.

To fully appreciate the prejudice that the lengthy extensions granted to Defendants cause the State, one first must understand that unlike the earlier *mutual* extensions that were granted, these extensions are *unilateral*. Thus, while Defendants get the full measure of time (and then some) to prepare their defenses, the State gets two to 9½ fewer months to prepare its reply to these defenses. For example, the State now has substantially less time to conduct expert discovery, substantially less time to prepare its responses to Defendants' defenses, substantially less time to prepare its dispositive motions, and substantially less time to prepare its motions in limine. In short, the burdens of the resultant compressed pre-trial schedule are not shared

equally by the two sides; rather the State unfairly bears the entire burden of the resultant compressed pre-trial schedule.

That portion of the August 8, 2008 Order granting Defendants until May 30, 2009, to disclose Dr. Chadwick's final report (and the Cargill Defendants until May 30, 2009 to disclose any final report on spring sampling) is particularly unfairly prejudicial. This date is not only *after* the date for exchange of fact witness lists (February 19, 2009), *after* the discovery cut-off date (April 16, 2009), and *after* the date for filing dispositive motions (May 18, 2009), but also only *a day before* the date for exchanging exhibits and deposition designations (June 1, 2009) and only *a month* before the date for filing motions in limine (July 6, 2009).

The State wants to be clear: it is *not* suggesting that the trial date in this action should be moved. This action has been brought by the State to address a serious and continuing human health and environmental problem. Any delay in the trial date would thus only result in an exacerbation of the injuries being suffered by the State, and would be unjust. Similarly, the delays in Defendants' disclosure obligations afforded by the August 8, 2008 Order are also unjust and unjustified. They are, quite simply, clearly erroneous and contrary to law.

IV. Conclusion

WHEREFORE, premises considered, the Court should find that the August 8, 2008 Order is clearly erroneous and contrary to law, the State's objection should be sustained, the August 8, 2008 Order should be vacated, and Defendants' expert disclosure deadline for all non-damages experts should be set for October 14, 2008.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2008, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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